

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:SER:GEO:ATL:TL-N-1002-99

MDArmstrong

date:

to: Director of Internal Revenue, Service Center  
Attn: Stop # 112  
from: District Counsel, Georgia District

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subject: Erroneous Refund  
[REDACTED]

In accordance with your request for an advisory opinion, we have reviewed the facts with respect to the above-named taxpayers.

ISSUES AND CONCLUSIONS

1. Issue. 6532.00-00. Whether the erroneous refund issued to the taxpayers was induced by fraud or misrepresentation of a material fact, thereby increasing the time period within which the government has to file suit to recover this erroneous refund from two to five years.

Conclusion. [REDACTED], (b)(7)e

[REDACTED], (b)(7)e

[REDACTED], (b)(7)e

FACTS

The following facts are taken from the material you sent to us with your document transmittal of February 8, 1999.

The Service issued a refund check to [REDACTED] and [REDACTED] in the amount of \$ [REDACTED] for the tax year ending [REDACTED]. The refund check, dated [REDACTED] was sent to [REDACTED]. On or about [REDACTED], [REDACTED] claimed non-receipt of the [REDACTED] tax refund check. After a trace was inputted, the Service issued a replacement

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check in the amount of \$ [REDACTED] to both [REDACTED] and [REDACTED]. The replacement check, dated [REDACTED], was made out to both taxpayers and sent to the same address as the original refund check.

A subsequent investigation showed that the original check dated [REDACTED] had been deposited in [REDACTED]'s account at [REDACTED] on [REDACTED]. Once this was discovered, a letter, dated [REDACTED], was sent to both taxpayers requesting repayment of the refund check that was erroneously sent. [REDACTED] responded to the [REDACTED] letter in a sworn affidavit denying that she received the original refund check because she was not living with her husband at any time during the [REDACTED] tax year. [REDACTED] also responded to the [REDACTED] letter alleging that he did not receive, nor did he deposit, the original refund check.

#### DISCUSSION

Issue 1. Recovery of an erroneous refund by suit under I.R.C. § 7405 is allowed only if the suit is brought within two years after making the refund, except that such suit may be brought at any time within five years if it appears that any part of the refund was induced by fraud or misrepresentation of a material fact. I.R.C. § 6532(b). "Wilful misrepresentation is not required." Merlin v. Sanders, 144 F. Supp. 541, 543 (D. Ga. 1956).

The present facts do not establish that the erroneous refund was induced by fraud, therefore, we will only discuss misrepresentation.

In United States v. Indianapolis Athletic Club, Inc., 785 F. Supp. 1336 (S.D. Ind. 1991), the Service listed three elements that must be established to prove misrepresentation of a material fact under § 6532(b): "(1) a misrepresentation of fact was made; (2) the misrepresentation was material; and (3) the decision by the Internal Revenue Service to make the refund was induced by the material misrepresentation." Answer Brief of the United States of America in Reply to Motion for Partial Summary Judgment, pp. 3-4. The court followed this three-part analysis, pointing out, however, that under the statute, it is the fact, and not the misrepresentation which must be material. 785 F. Supp. 1336 (S.D. Ind. 1991).

In Merlin v. Sanders, the taxpayer, in her 1949 return, represented she was entitled to credits totaling \$1,752.70, however, that amount included a refund of \$487.08 that was already issued to her. The court found that this amounted to a

misrepresentation, ruling that the five year limitation applied. 144 F. Supp. 541 (D. Ga. 1956), aff'd, 243 F.2d 821 (5<sup>th</sup> Cir. 1957).

On or about [REDACTED] [REDACTED] claimed non-receipt of the refund check dated [REDACTED]. The refund check was actually deposited in [REDACTED]'s bank account on [REDACTED]. This amounted to a misrepresentation of a material fact. It was this material misrepresentation which induced the Service to issue a replacement check. Therefore, it follows that the period of limitations within which the government has to recover this erroneous refund under § 6532(b) is five years.

[REDACTED]  
, (b)(7)e

[REDACTED]  
, (b)(7)e

We are closing our file and returning your file herewith. If you have any questions, please call the undersigned at 404-338-7931.

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MONICA D. ARMSTRONG  
Attorney

cc: TLCATS  
cc: Assistant Regional Counsel (Tax Litigation)  
cc: Assistant Chief Counsel (Field Service)